No. 09-929

In the Supreme Court of the United States

JACK L. HARGROVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. 1341 and 1346, to include a scheme "to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest-services fraud scheme.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 579 F.3d 752. The opinion of the district court (Pet. App. 16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2009. A petition for rehearing was denied on September 23, 2009 (Pet. App. 30-31). On November 17, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to February 2, 2010, and the petition was filed on February 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on seven counts of mail fraud and wire fraud, in violation of 18 U.S.C. 1341 and 1343 (Supp. II 2008); one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371; and two counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to concurrent prison terms of 168 months on the mail and wire fraud counts, 60 months on the conspiracy count, and 36 months on the tax counts. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioner and Laurence Capriotti owned a majority stake in Intercounty Title Company of Illinois, a title insurance and escrow agent. Petitioner served as president of the company and Capriotti as the chairman of its board of directors. By the late 1980s, Intercounty was running an annual deficit in the millions of dollars because of a price war in the title insurance market. Petitioner and Capriotti sought to cover those losses by investing Intercounty in junk bonds, but that strategy backfired when Intercounty incurred significant losses on the bonds, further increasing its deficit. Pet. App. 2; Gov't C.A. Br. 6-7, 8.

Beginning in 1987, petitioner and Capriotti engaged in a scheme to misappropriate large sums from Intercounty's escrow account. The escrow account contained deposits from Intercounty's clients as well as customer accounts that petitioner arranged for another company, Independent Trust Company (Intrust), to entrust to Intercounty purportedly for investment in government obligations. Gov't C.A. Br. 9-11. Petitioner and Capriotti misappropriated the funds in Intercounty's escrow account in various ways. Among other things, they ob-

tained loans secured by certificates of deposit purchased with funds from the escrow account, allowed the escrow-funded certificates of deposit to be cashed out in order to pay off the loans, and then applied the loan proceeds to Intercounty's operations. In addition, in 1994, Intercounty's treasurer began transferring escrow money directly to Intercounty's operating account. Petitioner and Capriotti used the stolen funds, *inter alia*, to pay off Intercounty's debt, increase its junk bond investments, purchase commercial property for Intercounty, and support Intercounty's troubled lender. *Id.* at 10-11.

2. In 2003, a grand jury sitting in the Northern District of Illinois returned a superseding indictment charging petitioner was charged with a number of offenses, including one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371, and several substantive counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343 and 1346. Sections 1341 and 1343 criminalize the use of the mail or wires to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. 1341, 1343. Section 1346 defines the term "scheme or artifice to defraud," for purposes of Sections 1341 and 1343, to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. The government proceeded on two overlapping theories of mail and wire fraud. In particular, the government argued that, in scheming to steal money from the escrow accounts, petitioner deprived Intercounty's customers, Intrust, and Intrust's account holders (1) of money or property and (2) of their intangible right of honest services. See Indict. Count. I ¶ 2. Before trial and again following the verdict, petitioner unsuccess-

fully challenged the mail fraud and conspiracy charges on the ground that Section 1346 is unconstitutionally vague both on its face and as applied in this case. Pet. App. 3, 16. Petitioner was convicted on the mail and wire fraud counts following a five-week jury trial. *Id.* at 18-19.

3. On appeal, petitioner renewed his claim that Section 1346 is unconstitutionally vague. The court of appeals rejected that argument, affirming petitioner's mail and wire fraud convictions based on its prior decisions in *United States* v. *Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003), and *United States* v. *Warner*, 498 F.3d 666, 697 (7th Cir. 2007). Pet. App. 3-4. Petitioner's only additional contention on appeal was that his trial counsel had a conflict of interest, but petitioner withdrew that claim at oral argument. *Id.* at 3.

ARGUMENT

1. Petitioner contends (Pet. 27-39) that 18 U.S.C. 1346 is unconstitutionally vague. That issue is currently pending before this Court in *Skilling* v. *United States*, No. 08-1394 (argued Mar. 1, 2010). In addition, vagueness concerns about Section 1346 are raised in support of the statutory interpretation issues presented in two other cases currently pending before the Court, *Black* v. *United States*, No. 08-876 (argued Dec. 8, 2009), and *Weyhrauch* v. *United States*, No. 08-1196 (argued Dec. 8, 2009). This Court therefore should hold this petition for a writ of certiorari pending the decisions in *Skilling*, *Black*, and *Weyhrauch* and then dispose of it as appropriate in light of those decisions.

2. Petitioner also seeks (Pet. 39-42) this Court's review of the district court's instructions to the jury on the elements of honest-services fraud. The court instructed

the jury that, in order to convict petitioner of honest-services fraud, it must find that petitioner "intentionally caused [his fiduciary duty to a victim] to be violated for the personal gain of some participant in the scheme whether or not [petitioner] benefitted." Pet. App. 34. Petitioner contends that the court should have included a further instruction that petitioner's compensation as a corporate officer could not qualify as "personal gain." *Id.*

In addition to challenging the facial constitutionality of Section 1346, the petitioner in *Skilling* has raised the question whether, to convict an employee of wire fraud on the ground that he deprived his employer of his honest services, the government must show that the employee intended by his scheme to obtain some "private gain." Skilling contends that any such private-gain requirement should not "include the very gain the employer explicitly contemplated as compensation for the employee's service." Pet. Br. at 53, *Skilling*, *supra* (No. 08-1394).

This Court need not hold this petition pending its decision in *Skilling* on the "employee-compensation" issue because petitioner has failed to preserve that claim. In the district court, petitioner did not request the instruction he now contends was necessary,[1] nor did he object in a timely manner to the district court's failure

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[1] Petitioner appears to suggest (Pet. 41) that he requested an instruction that employee compensation does not qualify as private gain in connection with the jury's mid-deliberations request for clarification of the court's "personal gain" instruction. But the record of that proceeding shows only that petitioner requested an instruction that "intent to economically deprive the victim" is an element of honest-services fraud. See Pet. App. 40-51.

to give such an instruction.[2] Petitioner also failed to raise the issue in the court of appeals; and that court therefore did not address it. Accordingly, the claim of instructional error is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

CONCLUSION

On the first question presented, the Court should hold the petition pending the decisions in *Skilling*, *Black*, and *Weyhrauch* and dispose of it as appropriate in light of those decisions. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

APRIL 2010

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[2] Petitioner raised the employee-compensation issue for the first time in his post-trial motion for a new trial, see Pet. App. 59, which was insufficient to preserve the instructional claim, see Fed. R. Crim. P. 30(d).